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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 88

THE UNITED STATES OF AMERICA, PETITIONER

v.

HARRY MURDOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Illinois sustaining a special plea in bar is reported at 51 F. (2d) 389. That decision was reversed by this Court, 284 U.S. 141. The charge of the District Court at the trial appears at R. 47–50. The opinion of the Circuit Court of Appeals (R. 60–63) is reported in 62 F. (2d) 926.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 7, 1932 (R. 63). A petition for rehearing was denied February 22, 1933 (R. 64).

Petition for a writ of certiorari was filed May 22, 1933, and granted October 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a witness at a hearing authorized by Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, is immune from prosecution under Section 146 (a) of the Revenue Act of 1928 for refusal to answer questions properly propounded to him if he acted in good faith and under an actual but erroneous belief that he was not required to answer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

The respondent was summoned pursuant to the provisions of Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928,[1] *infra,* pp. 12–13, and, upon being sworn,

[1] Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, authorizes the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, to "require the attendance of the person rendering the return" and to "take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

refused to answer certain questions propounded to him (R. 31–33). He was indicted under Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928, *infra*, pp. 12–13, for willfully failing to give testimony and supply information (R. 1–5). He filed a special plea to the indictment alleging that his refusal was based upon fear that his answers might incriminate him under State laws, and the District Court sustained the plea. *United States* v. *Murdock,* 51 F. (2d) 389. A direct appeal was taken to this Court, where the decision of the District Court was reversed. *United States* v. *Murdock,* 284 U.S. 141.

The case was thereupon tried in the United States District Court for the Southern District of Illinois (R. 8–10). During the trial the respondent requested the court to instruct the jury (R. 49):

> * * * to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that they should consider that in determining whether or not his refusal to answer the questions was wilful.

The court refused this request (R. 49), having theretofore instructed the jury as follows (R. 48):

> You will observe that the offense charged here is the willful failure or refusal to furnish information. That means, Gentlemen of the Jury, that having an opportunity to do so he deliberately designed not to furnish the information.

> In the evidence before you and in the discussions by counsel, you have heard much about incrimination or self-incrimination; and in the testimony that was taken before the Revenue Agent the defendant here refused to answer questions because to do so might incriminate or degrade him, particularly under the state law. In fact, there is one place in the evidence where he expressly says that he refuses to answer because to do so might incriminate him under the state law. You are instructed, Gentlemen of the Jury, that he had no right to interpose that objection to the giving of the information which it was sought to have him give to the agent.
>
> Gentlemen of the Jury, there is only one question here for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse and if you should so find from the evidence, he is guilty. If he did not, he is not guilty.

The respondent was found guilty (R. 9, 50) and was sentenced to a year in jail and fined $5,000 (R. 10). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, where, in reversing the judgment of the District Court on the ground that the requested instructions should have been given, the court said (R. 63):

> The good-faith belief in advice given by a reputable counsel may, and ordinarily will,

> have a bearing upon the willfulness of the conduct of a party who follows it. * * *. Whether his asserted claim of protection is in good faith may be disputed, but a jury question is frequently thereby raised. * * *.

Petitioner brings the question thus presented to this Court for review.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that it was reversible error for the District Court to refuse to instruct the jury that they should consider the respondent's good faith and actual belief in determining whether or not his refusal to answer the questions propounded to him was willful.

ARGUMENT

Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928 (*infra*, pp. 12–13), under which respondent was indicted and convicted, make it a crime for any person required to "supply any information, for the purposes of the computation, assessment, or collection of any tax" to "willfully" fail to "supply such information, at the time or times required by law or regulations."

The narrow question here presented is whether the phrase "willfully fails to * * * supply such information" as used in those statutes means anything more than an intentional, deliberate refusal, as charged by the District Court (R. 48), or whether bad faith is an essential ingredient of the crime, as held by the Circuit Court of Appeals (R. 63).

A similar question was before this Court in *Sinclair* v. *United States*, 279 U.S. 263. Therein Sinclair was charged with a violation of Section 102 of the Revised Statutes (U.S.C., Title 2, Sec. 192),[2] in that he refused to answer questions propounded to him by a committee of the Senate. Upon conviction and sentence the case was brought to this Court, where it was contended that the trial court erred in excluding evidence that in refusing to answer Sinclair acted in good faith and on the advice of competent counsel. In rejecting such contention this Court said (p. 299):

> 6. There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102

[2] Section 102 provides:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, *willfully* makes default, or who, having appeared, *refuses to answer any question pertinent to the question under inquiry*, shall be deemed guilty of a misdemeanor * * *. (Italics ours.)

> made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. * * *

Similarly, in *Chapman* v. *United States,* 8 App.D.C. 302, Chapman refused to answer questions put to him by a committee of the United States Senate. He was indicted, tried, and convicted, and upon appeal to the Court of Appeals of the District of Columbia contended that (p. 316) "in order to sustain a valid conviction * * * it was necessary that it should appear that his refusal to answer the questions put to him was in bad faith and with evil intent." In rejecting this contention the court said (p. 317):

> The refusal to answer necessarily implies willfulness in the legal sense, and the question of bad faith or evil intent has no place whatever in the case. * * *. He must be held to have intended the result which followed his refusal, which was the defeat of the pending investigation, which failed for the want of such testimony as was sought from him; and so far as that investigation was concerned, it was plainly a matter of no consequence that he may have believed himself to have been justified.

Such was the position taken by the District Court herein when it instructed the jury that willful failure to supply the required information means "that having an opportunity to do so he deliberately designed not to furnish the information" (R. 48). And again (R. 48):

> Gentlemen of the Jury, there is only one question here for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse, and if you should so find from the evidence, he is guilty. If he did not, he is not guilty.

Thus the District Court did nothing more than apply the well-established rule that where a statute makes a willful act, or the willful refusal to do an act, a crime, it is only necessary to show that the defendant ran counter to the statutory mandate and that in so doing he acted deliberately and willfully. See *Armour Packing Co.* v. *United States,* 209 U.S. 56, 85–86; *Reynolds* v. *United States,* 98 U.S. 145, 166–167.

The statutes here under consideration do not make bad faith an element of the crime (see *United States* v. *Murdock,* 284 U.S. 141, 148), and the Circuit Court of Appeals was without power to add to the statute (*Standard Sanitary Mfg. Co.* v. *United States,* 226 U.S. 20, 49).[3] Nor can the decision of the court below be sustained upon the ground that "The good-faith belief in advice given by a reputable counsel" (R. 63) had a bearing upon the re-

[3] Therein this Court said (p. 49):

> The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.

spondent's willfulness. Undoubtedly the fact that he consulted counsel before acting had a bearing upon his willfulness. However, instead of tending to establish that his action was not willful, it shows conclusively that he did act willfully after premeditation and deliberation. As stated by the court in *Chapman* v. *United States, supra,* p. 317:

> His refusal to testify was a deliberate and wilful act, all the more deliberate and wilful because he took counsel upon the subject and took time to consider the consequences; * * *.

Willful and deliberate refusal to answer questions pursuant to the mandate of a statute is not unlike willful and deliberate refusal to answer questions propounded in court regardless of the ruling of the court upon the question of immunity. In such a situation a party may not substitute his judgment for that of the court (*Mason* v. *United States,* 244 U.S. 362, 365–367; *Brown* v. *United States,* 276 U.S. 134, 145; *Merchants' Warehouse Co.* v. *Reber,* 269 Fed. 974, 975 (C.C.A. 3d)); nor may he rely upon the advice of counsel in defiance of a court order (*National Corporation* v. *Bartram Hotel Co.,* 263 Fed. 250, 251 (E.D.Pa.), affirmed, 269 Fed. 974 (C.C.A. 3d); *Royal Trust Co.* v. *Washburn, B. & I. Ry. Co.,* 113 Fed. 531, 538–539 (C.C., W.D.Wis.); *In re La Varre,* 48 F. (2d) 216, 222 (S.D.Ga.)). For, as stated by this Court in *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 450:

> If a party can make himself a judge of the validity of orders which have been is-

sued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Similarly, if a party may make himself the judge of whether he shall obey the mandate of a statute and by his own acts of disobedience defeat the purpose of the statute, then must an important power of Congress be set at naught and every citizen made a law unto himself. Cf. *Reynolds* v. *United States,* 98 U.S. 145, 166–167.

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals was erroneous and should therefore be reversed.

J. CRAWFORD BIGGS,
Solicitor General.
SEWALL KEY,
JOHN H. MCEVERS,
Special Assistants to the Attorney General.

OCTOBER 1933.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

REVENUE ACT OF 1926, C. 27. 44 STAT. 9, 50, 113, 116

SEC. 256. All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income * * * shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

* * * * *

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

* * * * *

(U.S.C.App., Title 26, Sec. 1023.)

SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons (U.S.C.App., Title 26, Sec. 1247).

SEC. 1114. (a) Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * *

(U.S.C.App., Title 26, Sec. 1265.)

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 836, 878

SEC. 148. [This section is identical with Section 256 of the 1926 Act above quoted.]

SEC. 618. EXAMINATION OF BOOKS AND WITNESSES:

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

SEC. 146 (a). [This section is identical with Section 1114 (a) of the 1926 Act above quoted, except that the word "title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 Act.]

U. S. GOVERNMENT PRINTING OFFICE: 1933